

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

RICHARD COLE,

Plaintiff,

Case No. 3:08-cv-432

vs.

Judge Thomas M. Rose

**MICHAEL J. ASTRUE,
Commissioner of Social Security,**

Magistrate Judge Michael R. Merz

Defendant.

**ENTRY AND ORDER OVERRULING COLE’S OBJECTIONS (Doc. #14)
TO THE MAGISTRATE JUDGE’S REPORT AND
RECOMMENDATIONS (Doc. #13); ADOPTING THE MAGISTRATE
JUDGE’S REPORT AND RECOMMENDATIONS (Doc. #13) IN ITS
ENTIRETY; AFFIRMING THE COMMISSIONER’S DECISION THAT
COLE WAS NOT DISABLED AND TERMINATING THIS CASE**

Plaintiff Richard Cole (“Cole”) filed an action in this Court on May 4, 2005, seeking judicial review of a prior decision by the Commissioner regarding his disability. On June 8, 2006, this Court remanded the matter for re-evaluation of the entire record commencing at Step 3 of the sequential evaluation process. On remand, the Commissioner again found that Cole was not disabled. Cole has now brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final (second) decision of the Defendant Commissioner of Social Security (the “Commissioner”) denying his application for Social Security benefits.

On July 30, 2009, United States Magistrate Judge Michael R. Merz filed a Report and Recommendations (doc. #13) recommending that the Commissioner’s (second) decision that Cole was not disabled be affirmed. Cole subsequently filed Objections (doc. #14) and the

Commissioner has responded to Cole's Objections (doc. #16).

Based upon the reasoning and citations of authority set forth in the Magistrate Judge's Report and Recommendations (doc. #13) and in Cole's Objections (doc. #14) and the Commissioner's Response (doc. #16), as well as upon a thorough de novo review of this Court's file, including the Administrative Transcript, and a thorough review of the applicable law, this Court adopts the aforesaid Report and Recommendations in its entirety and, in so doing, affirms the Commissioner's latest decision that Cole is not disabled. Finally, Cole's Objections to the Magistrate Judge's Report and Recommendations are overruled.

This Court's function is to determine whether the record as a whole contains substantial evidence to support the Administrative Law Judge's ("ALJ's") decision. *Bowen v. Commissioner of Social Security*, 478 F.3d 742, 745-46 (6th Cir. 2007). This Court must also determine whether the ALJ applied the correct legal criteria. *Id.*

Regarding the substantial evidence requirement, the Commissioner's findings must be affirmed if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citing *Consolidated Edison Company v. NLRB*, 305 U.S. 197, 229 (1938)); *Landsaw v. Secretary of Health and Human Services*, 803 F.2d 211, 213 (6th Cir. 1986). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson, supra*, at 401; *Ellis v. Schweicker*, 739 F.2d 245, 248 (6th Cir. 1984). Substantial evidence is more than a mere scintilla, but only so much as would be required to prevent a directed verdict (now judgment as a matter of law) against the Commissioner if this case were being tried to a jury. *Foster v. Bowen*, 853 F.2d 483, 486 (6th Cir. 1988); *NLRB v. Columbian*

Enameling and Stamping Company, 306 U.S. 292, 300 (1939).

The second judicial inquiry - reviewing the ALJ's legal criteria - may result in reversal even if the record contains substantial evidence supporting the ALJ's factual findings. *See Bowen*, 478 F.3d at 746. A reversal based on the ALJ's legal criteria may occur, for example, when the ALJ has failed to follow the Commissioner's "own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right." *Bowen*, 478 F.3d at 746(citing in part *Wilson v. Commissioner of Social Security*, 378 F.3d 541, 546-47 (6th Cir. 2004)).

In this case, the Commissioner has applied the correct legal criteria and the Commissioner's decision is supported by substantial evidence. WHEREFORE, based upon the aforesaid, Cole's Objections to the Magistrate Judge's Report and Recommendations (doc. #14) are OVERRULED, and this Court adopts the Report and Recommendations of the United States Magistrate Judge (Doc. #13) in its entirety. The Commissioner's latest decision that Cole was not disabled and therefore not entitled to Social Security benefits is AFFIRMED.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

DONE and ORDERED in Dayton, Ohio, this Fourth day of September, 2009.

s/Thomas M. Rose

JUDGE THOMAS M. ROSE
UNITED STATES DISTRICT COURT

Copies furnished to:

Counsel of Record